No. 84-4

In the Supreme Court of the United States

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL.,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

GIDEON KANNER
1441 West Olympic Boulevard
Los Angeles, California 90015
Telephone: (213) 736-1058,
(818) 848-6765
Attorney for Amicus Curiae California Building Industry Association

Westside Law Publishers Los Angeles, California (213) 477-0491

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With consent of the parties, The California Building Industry Association (CBIA) respectfully submits this brief as *amicus curiae* in support of the Respondent.

INTEREST OF AMICUS CURIAE AND NATURE OF THE PROBLEM ADDRESSED

CBIA is an umbrella organization representing some 5,000 company members of seven regional Building Industry Associations throughout California. As an organization of homebuilders, CBIA is vitally concerned with the impact of harsh land use

regulations which, however motivated, at once impact adversely on its members' economic interests and on the availability of housing, particularly housing that is affordable to those in the lower income brackets and increasingly to the middle class.[1] CBIA is concerned that, as is alarmingly evident in California (but by no means confined to it), harsh land use restrictions often simply prevent housing construction and thus effectively bar entry not only into desirable suburbs, but also into homeownership altogether by the young, the middle class, and particularly minorities. For an enlightening, concise and lucid insight of a noted scholar into the gritty realities of the use of professedly high-minded land use regulations, see Frieden, "The Environmental Protection Hustle," 1979, MIT Press, passim. On a more philosophical level, see Tucker, "Progress and Privilege: America in an Age of Environmentalism", Anchor Press/Doubleday, 1982.

In sum, CBIA finds itself in a position where in the context of the issues at bench, the self-interest of its members coincides with the interest of the population in the area served by it, and — it is forcefully submitted — with the public interest. In the final analysis, CBIA is interested in building homes for people who need them. So is a growing segment of the population that is priced out of home ownership, and thereby sentenced, as it were, to protracted or permanent status as a sort of an apartment renter underclass.[2] It is in the public interest to provide increased — not shrunken — housing opportunities for

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[1]It is by now a fact of judicially noticeable proportions that California has the most expensive housing in the Nation. Much of this cost, some 18-20% in the San Francisco Bay area, for example, is attributable to land use regulations, such as growth controls and moratoria. Katz and Rosen, *The Effects of Land Use Controls on Housing Prices*, at p.47, Working Paper 80-13, Center for Real Estate and Urban Economics, University of California, Berkeley. The problem, moreover, is increasingly present beyond California; see Report of the President's Commission on Housing (1982), particularly Chap. 13, "Government Regulation and the Cost of Housing", pp. 1-5 *et seq.*

[2]See *Euclid v. Ambier Realty Co.*, 272 U.S. 365, 394-395 (1926).

that population. Effective — not theoretical — remedies for excessive, use-stultifying land use regulations will help provide such opportunities.

SUMMARY OF ARGUMENT

CBIA respectfully urges that the court reject the dogmatic importunings of the Petitioner and its *amici*, of the tenor that "just compensation" expressly provided for by the Takings Clause of the Constitution, or damages explicitly authorized by 42 U.S.C. § 1983,[3] nonetheless be made unavailable for regulatory takings. It is respectfully suggested that the Court reaffirm instead the pragmatic and flexible approach which (depending on the factual circumstances of the governmentally - inflicted wrong) would provide damages [4], or in cases where the government acts wholly extra-legally and the harm is purely prospective, specific relief [5], or a combination of both, as outlined in Mr. Justice Brennan's opinion in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

The reasons for the position espoused by this *amicus* are:

First, the "just compensation" remedy is explicitly provided for in the Constitution, and is as surely applicable to partial and temporary takings as to others.[6]

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[3]Since §1983 explicitly provides for "an action at law," one is baffled how such arguments are made with a straight face (see e.g. Brief of California, et al., at p. 20; cf. Brief of St. Petersburg, at pp. 27-28, fn. 68). See *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

[4]*Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S. Ct. 2862, 2880[8] (1984).

[5]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[6]In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104,130 (1978), this Court observed that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated". In the ad hoc factual context of that case, that was a reasonable expression, because there the owner had already improved the entire site with a major building which concededly produced a reasonable

Second, although ignored by Petitioner and its amici, this Courts' precedents on the issue of remedies for uncompensated takings, beginning at least with *Hurley v. Kincaid,* 285 U.S. 95 (1932), and continuing through *Ruckelshaus v. Monsanto Co., supra,* 104 S. Ct. at 2880 [8], decided only last term, make it crystal clear that just compensation is the preferred remedy because it tends to make the aggrieved citizen whole, while permitting the governmental entity to pursue" . . . the accomplishment of important governmental ends . . ." (*Hurley v. Kincaid, supra,* 285 U.S. at 104, fn. 3).[7] Moreover, 42 U.S.C. § 1983 provides for damages in case of regulatory land use takings: see *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra.*

Third, as astutely noted by Mr. Justice Brennan, non-monetary remedies tend to be ineffective, and provide enormous opportunities for governmental entities to drag their feet (or even to act in bad faith); see *San Diego Gas & Elec. Co. v. City of San Diego, supra.* 450 U.S. at 655, fn. 22) [8].

Fourth, specific remedies require the courts to be telling regulatory entities *on an ongoing basis* how they may and may not regulate; *injunctive relief requires judicial oversight and*

return. But that hardly justifies the transplantation of the quoted metaphor into the context of the government simply taking a part of an unimproved tract of land, and in effect saying to its owner: "We don't have to pay, because we only took a part of your land, leaving you some residue". See *American Savings & Loan Assn. v. County of Marin,* 653 F. 2d 364 (1981 9th Cir.).

[7]For a concise summing up of *Hurley* and its progeny through 1974, see Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty,* 1980 Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, at pp. 195-206. Since then the Court has adhered to this settled approach to remedies for takings in *Dames & Moore v. Regan,* 453 U.S. 654, 689, 691 (1981), and *Ruckelshaus v. Monsanto, supra.*

[8]The inefficacy of specific remedies was also noted by Richard F. Babcock, in his widely acclaimed book, "The Zoning Game," at p. 13. See footnote 23, *infra.*

continuing enforcement, thereby embroiling courts far more deeply in complex and varying land regulation schemes replete with overtly pursued local politics, than would the relatively simpler decision whether a particular regulatory scheme took a "stick" from the landowner's bundle of rights, thus requiring recompense. Moreover, there is a greater tendency to compromise monetary claims, whereas non-monetary ones provide incentives to defendants to litigate to the bitter end because it is cheaper (particularly where defense lawyers are salaried as muncipal lawyers often are).

Fifth, as explicitly recognized by the Court in *Owen v. City of Independence,* 445 U.S. 622, 651 (1980), the imposition of compensatory damages not only effectively redresses the wrong (and indeed is the only way of doing so where economic injury has already occured), but also provides a wholesome deterrent to future constitutional wrongdoing.

Sixth, the cries of fiscal doom emanating from some of Petitioner's amici (see e.g., Brief of New York City, passim), are little more than self-serving importunings that this Court make constitutional violations cheap and convenient. They are unworthy suggestions that the Court opt for chilling constitutional rights in preference to "chilling" (i.e., providing disincentives to) unlawful official conduct that is quite deliberately designed to constrict those constitutional rights to their absolute minimum and indeed beyond.[9] This Court has repeatedly

[9]This is no hyperbole. Petitioner's amici demand for themselves "freedom" to experiment with "innovative" (read "confiscatory") land use restrictions. But the worst that the "innovators" want for themselves, should they infringe on the Constitution, is a judicial tut-tut of the "you shouldn't have done it" genre, followed by another go at the hapless owner (see e.g. Brief of California et al., p. 1, which importunes this Court to put the fox in charge of the chicken house). That is no more than the pursuit of the proverbial free lunch; see *San Diego Gas & Electric Co., supra,* 450 U.S. at 652. Please bear in mind that in this very case the original developer went under by foreclosure. This is no fluke; California law alone is replete with cases in which owners lost their property by foreclosure while being "regulated" to death. See, e.g., *Jacobson v. Tahoe Regional Plan-*

rejected the odious notion that constitutional violations should be tolerated because that may be cheaper: *Watson v. Memphis,* 373 U.S. 526, 537 (1963), *United States Trust Co., v. New Jersey,* 431 U.S. 1, 28-29 (1977), *San Diego Gas & Electric Co. v. San Diego, supra,* 450 U.S. at 661 (Brennan, J. dissenting). More importantly, the ostensibly feared large judgments can threaten *only* if there have been large-scale, serious violations of constitutional rights. If so, all the more reason for this Court to provide disincentives to such conduct. As a noted commentator put it in another context, the "just compensation" guarantee does not extend only to cases where the taking is easy and cheap; indeed, the need for compensation is greatest where the loss is greatest. Stoebuck, *Condemnation of Rights The Condemnee Holds in Lands of Another,* 56 Iowa L. Rev. 293, 307 (1970).

Finally, clear recognition by this Court of limits on local regulatory powers that destroy private property rights, *and* the concurrent imposition of *effective* remedies making the victim whole and deterring future wrongdoing, will have the wholesome effect of balancing the social scales. After all, this isn't 1954; Rachel Carson's concerns for the environment are no longer a lone cry in the wilderness. In the ensuing quarter-century, environmentally inspired regulations have proliferated, and are now applied by a formidable array of powerful governmental bureaucracies armed to the teeth with far-reaching regulations imposed by a tough enforcement apparatus. The environmental movement has come of age, and like all other powerful forces in a free society must recognize its own limitations as well as responsibility to its victims. That is no more than a decent foundation on which a just society must ultimately rest. In

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ning Agency, 566 F.2d 1353, 1366-1367 (1978, 9th Cir.); *Orsetti v. Fremont,* 80 Cal.App. 3d 961, 146 Cal.Rptr. 75 (1978); *Hollister Park Investment Co. v. Goleta County Water Dist.,* 82 Cal.App. 3d 290, 147 Cal.Rptr. 91 (1978); *Frisco Land & Mining Co. v. State,* 74 Cal.App. 2d 736, 141 Cal.Rptr. 820 (1977); *County of Los Angeles v. Berk,* 26 Cal.3d 201, 161 Cal.Rptr. 742, 605 P.2d 381 (1980); *Toso v. City of Santa Barbara,* 101 Cal.App. 3d 934, 162 Cal.Rptr. 210 (1980).

short, it is time to strike a balance between regulatory ends and constitutionally respectable means. A recognition that the victim of an overzealous regulatory process is entitled to recompense for demonstrable losses, will tend to accomplish just that.

ARGUMENT

I

PRELIMINARY STATEMENT: WHAT IS THE ISSUE BEFORE THE COURT?

While an amicus must perforce take the case as the parties have made it, there is nonetheless an unusual problem that presents itself at bench. Petitioner's briefing appears to be a candid effort to reargue the raw evidence favorable to itself, as if it were before a new trier of fact in the first instance (compare *Perkins v. Standard Oil Co.* 395 U.S. 642, 648 (1969), and *Gold v. National Sav. Bank, etc.,* 641 F. 2d 430, 434 (1981), 6th Cir.)). The result of such unorthodox approach by Petitioner is to leave an amicus somewhat uncertain as to the precise issues Petitioner means to address.[10]

In spite of such difficulties, at the very least the following appears. The lower courts have applied Tennessee law (either correctly or in a manner acquiesced in by Petitioner) to hold that it was unlawful for Petitioner to prevent construction of Respondent's subdivision under the 1973 regulations, thereby preventing economically viable use of the affected land.[11]

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[10]I.e., Petitioner's first Question Presented (Pet Br., p.i) disparages the lower courts' treatment of adjudicated facts, while the third Question Presented candidly quarrels with the lower courts' resolution of disputed evidence that led to the finding of estoppel, even though Petitioner has affirmatively acquiesced in the estoppel judgment by (a) not seeking appellate review thereof, and (b) by entering into an agreement (Pet. Br., Appendix, pp. 35-39) implementing that aspect of the District Court's decision and thereby rendering any argument on that issue moot.

[11]As the opinion below makes clear (729 F. 2d at 403) there was substantial evidence that in 1973 the Planning Commission gave written approval for 736 units, but later reneged. Any dispute thereon

Thus, *the only legal issue properly raised* — as opposed to rearguing disputed facts adjudged against and acquiesced in by Petitioner — is what is the nature of the remedy to be granted Respondent for the years of unlawful denial by Petitioner of economically viable use of the Respondent's land. To put it another way, the question is one of remedies for the time Respondent was deprived of economically viable use of its property. Since such deprivation is now irretrievably in the past, it seems to amicus that this puts the case at bench into the "damages or nothing" posture (*Bivens v. Six Unknown etc. Agents,* 403 U.S. 388, 410 (1971) (Harlan, J., concurring)) insofar as Petitioner's serious interim economic losses for the period of use deprivation are concerned.[12] To channel the court's efforts into any "invalidation" discourse now — as urged by Petitioner and its amici — would lead to an academic exercise in mootness: i.e., how does a court "invalidate" something which has already irreversibly occurred? How do losses already suffered "unhappen"?

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was resolved by decisions of the trier of fact — *both* judge and jury — against Petitioner, *but Petitioner did not appeal therefrom;* on the contrary, Petitioner *voluntarily* entered into an agreement implementing that aspect of the case, thus giving rise to a situation closely analogous to *Donovan v. Penn Shipping Co.,* 429 U.S. 648 (1977). The question of the lawfulness of Petitioner's conduct is thus at this time finally resolved against it, and disputations thereon barred by a judgment long since final, as well as mooted by Petitioner's voluntary implementation thereof (see Pet. Br., Appendix, pp. 35-39).

[12]The issue is hardly new. See *Gordon v. City of Warren,* 579 F. 2d 386 (1978 6th Cir.), *6th Camden Corp. v. Evesham Township,* 420 F. Supp. 709, 727-730 (D.N.J. 1976), recognizing the right to constitutionally-based damages for temporary deprivation of economically viable use of land, pending the owner's judicial establishment that the deprivation was unlawful under state law. Accord, *Keystone Associates v. State,* 333 N.Y.S. 2d 27 (App.Div. 1972), aff'd. 307 N.E. 2d 254 (N.Y. 1973).

II

THIS COURT'S HISTORY OF EXPLICIT RECOGNITION OF THE "JUST COMPENSATION" REMEDY FOR TAKINGS, AS AVAILABLE AND PREFERRED, IS LONGSTANDING AND THOROUGHLY SETTLED.

The supposed proposition pressed on the Court (that in cases of takings the "traditional" remedy is invalidation or enjoining of the confiscatory governmental conduct) is simply a myth which, like all mythology, derives its sustenance from a disregard of reality. The fact is that this Court has dealt with the issue of remedies for uncompensated takings over a half-dozen times, and those decisions opt for the monetary remedy of inverse condemnation, as primary. Petitioner and its amici have simply ignored all that decisional law,[13] and, save for vigorous self-serving arguments, have not suggested any legitimate reason why this Court should suddenly depart from the sound and settled analysis outlined by Mr. Justice Brandeis in *Hurley v. Kincaid,* 285 U.S. 95 (1932), and followed ever since.

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[13]An egregious example of such disregard is provided at pp. 6-7 of the amicus brief of California et al., where not only does Petitioner's friend ignore virtually all pertinent precedents of this Court, but it also has the temerity to charge Respondent with advancing "fiction". Of course, case law is to the contrary, and speaks for itself, belying in the process California's assertion that this Court has permitted the just compensation remedy only in cases of physical seizure, which is demonstrably not so; see *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. U.S. 391 (1979); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974); *Dames & Moore v. Regan,* 453 U.S. 654, 688-689 (1981); also see *United States Trust Co. v. New Jersey, supra,* 431 U.S. 29, fn. 27, and accompanying text. At times, the property right in question (e.g., a lien) is incapable of physical seizure, but it is protected by the "just compensation" clause just the same — *Armstrong v. United States,* 364 U.S. 49 (1960). The same is true of contractual rights: *Lynch v. United States,* 292 U.S. 571, 579 (1933).

It is difficult to see how this Court could have been clearer, when at the end of last term it unequivocally held in *Ruckelshaus v. Monsanto Co., supra,* 104 S. Ct. at 2880 [8]:

> "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking" (citations and footnote omitted).[14]

Of course, *Ruckelshaus* was merely the most recent manifestation of a settled line of decisions going back at least to 1932: *Hurley v. Kincaid, supra,* 285 U.S. 95; *Dugan v. Rank,* 372 U.S. 609 (1963); *Fresno v. California,* 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974); *Dames & Moore v. Regan,* 453 U.S. 654, 688-689 (1981). Also see, *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 752-753 (1950) (held: state police power rendered property right unenforceable by injunction, but could not obviate constitutional obligation to pay just compensation for its actual extinguishment).

It is equally well settled that it is only in those rare cases where a government official attempts to act but, as it turns out, the act is wholly extralegal (i.e., the claimed power to act does not stem either from the Constitution directly, nor is it authorized

[14]A seemingly inconsistent assertion appears in footnote 12, in *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 166 (1958). However, the only authority cited there in support is *Youngstown Sheet & Tube Co., v. Sawyer, supra,* 343 U.S. 579, which, of course, dealt with a prospective, wholly extralegal seizure, rather than an already accomplished taking under otherwise proper powers. To the extent the terse footnote assertion in *Central Eureka* is inconsistent with the fully considered holding in *Ruckelshaus v. Monsanto Co.,* the former must undoubtedly be deemed overruled sub silentio by the latter. However, the two expressions need not necessarily be viewed as inconsistent, when the prospective vs. accomplished nature of the respective types of takings is kept in mind. Moreover, the *Central Eureka* footnote addresses "arbitrary governmental action" rather than a taking; the two, of course, may, but need not be the same.

by legislation) that injunctive relief becomes available to restrain *a prospective* taking. *Youngstown Sheet & Tube Co. v. Sawyer, supra,* 343 U.S. 579, *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-691 (1949). Of course, where a taking (i.e., deprivation of the owner, not necessarily accretion of any formal interest to the taker — *United States v. General Motors Corp.,* 323 U.S. 373, 377-378 (1945)) has actually occurred, it has been held from the outset that the government, as a creature of the Constitution, cannot even form the intent (much less act on it) to deprive an individual of property without just compensation. *Meigs v. McClung's Lessee,* 9 Cranch (US) 11, 18 (1815). Also, see *Armstrong v. United States,* 364 U.S. 40, 48 (1960) (*held:* Where government obtained benefit of property, it had to pay just compensation for deprivation of private liens therein irrespective of its ". . . intent or purpose . . .").

To the above discussion one must add the teaching of *Ruckelshaus* that in inverse as well as direct taking cases the police power and taking power are coterminous (104 S. Ct. at 2879). That perforce means that when a regulatory governmental entity chooses to regulate within its general powers to promote police power objectives of public health, safety, welfare or morals, it thereby establishes a legitimate objective[15] that is entitled to the same degree of judicial deference as the avowed pursuit of the eminent domain power for a public purpose; see *Hawaii Housing Authority v. Midkiff,* ____ U.S. ____, 104 S. Ct. 2321, 2329 (1984); *Ruckelshaus, supra,* 104 S. Ct. at 2879. Since the judicial role in "second-guessing the legislature" is held by these authorities to be extremely narrow, it follows that a regulatory taking effected by an overreaching statutory application is in every constitutional sense a taking for public use, for which compensation is mandated by the Fifth Amendment (binding on the states through the Due Process Clause of the Fourteenth Amendment — *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 15, 160 (1980)). Put another way, when regulators take the position that their regulation promotes the

[15]As opposed to wholly extralegal prospective acts as in *Youngstown Sheet and Tube Co., supra.*

police power objectives, and as such is entitled to judicial deference for purposes of its validity, they cannot simultaneously assert when their regulation effects a temporary taking, then the regulation suddenly becomes so unimportant that the courts should disregard the teachings of *Midkiff* and *Ruckelshaus*, eschew all deference to the legislature, and as a matter of routine simply invalidate the regulation — as a first, not last, resort — merely to spare the regulators the need of obeying the weighty "just compensation" command of the Fifth Amendment. Such an argument is simply self-contradictory; it just won't wash. " . . . [P]ower, once granted does not disappear like a magic gift when it is wrongfully used." *Bivens v. Six Unknown etc. Agents, supra,* 403 U.S. at 392.

In sum, in spite of expansive assertions, Petitioner and friends are unable to put their finger on any holding of this Court that where a taking has already occurred, the "remedy" should be the ineffective and academic exercise of telling the wrongdoer through a court decree that it shouldn't have done what it already did, leaving the victim uncompensated for serious economic losses already inflicted. Petitioner and friends are unable to do so because no such unjust cases are extant; as shown above, this Court has historically opted for effective compensatory remedies as part of its remedial arsenal, and has done so consistently in physical as well as non-physical takings (see footnote 13, *supra*). No legitimate reason appears why that reasoned and mature doctrinal approach to the taking problem should be suddenly abandoned now.

III

THE ACTS OF PETITIONER WERE WITHIN ITS POWERS, EVEN IF THE MANNER OF EXECUTION EXCEEDED CONSTITUTIONAL LIMITS.

Two points need to be touched on briefly in connection with the law of remedies discussed above.

First, Ruckelshaus, supra, speaks of takings of property ". . . duly authorized by law . . ." Does that mean that there

must be express authorization of the taking qua taking?[16]

The short answer to this question was provided by this Court in *Davis v. Newton Coal Co.*, 267 U.S. 292, 301 (1925): "The incantation pronounced at the time [of taking] is not of controlling importance; our primary concern is with the accomplishment."[17] Likewise, *Hughes v. Washington,* 389 U.S. 290, 298 (1967): " . . . The Constitution measures a taking of property not by what a State says, or what it intends, but by

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[16]This issue bears comment in light of the ingenious assertion in the Brief of the United States, that when government action is "not authorized", no "taking" can result. The vintage case of *Hooe v. United States,* 218 U.S. 322 (1910) relied on by the Solicitor General is simply not on point because there the Congress expressly refused to appropriate a $6,000 annual rent, whereupon the claimant rented the premises to the government for $4,500 (which he accepted) and sued on the balance. What that has to do with the ad hoc factual analysis required at bench (*Kaiser Aetna v. United States,* 444 U.S. 164, 174-175 (1979)) is obscure. With respect, the Solicitor General seems to confuse those cases where the action is wholly extralegal and hence the officials are without any power to act at all (e.g., *Youngstown Sheet & Tube Co. v. Sawyer, supra,* 343 U.S. 579), and those cases where the power to act exists, but the illegality springs from failure to authorize payment of just compensation (*Hurley v. Kincaid, supra, Ruckelshaus v. Monsanto Co., supra),* thereby triggering a *constitutional* remedy (*Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

[17]Another answer is provided by the fact that the Tucker Act provides a procedure for recovering compensation from the government for *claims arising under the Constitution. Jacobs v. United States, supra,* 290 U.S. at 16. But if it were first necessary to show that the governmental act was "authorized" (in the sense of *the taking* being authorized rather than the governmental act that led to the taking) that would make self-stultifying nonsense out of the Tucker Act, for then a *claim under the Constitution* would be of no avail, and the claimant would be limited to claims under statutes "authorizing" *the taking.* Compare *United States v. Dickinson,* 331 U.S. 745, 748-749 (1947). Put another way, if the taking itself first had to be authorized by legislation, there could never be an *inverse* condemnation case. Yet, this Court's many precedents and the daily business of the U.S. Claims Court bear striking witness to the contrary.

what it *does* (Stewart, J. concurring, emphasis in the original.) See, *San Diego Gas & Electric Co., supra,* 450 U.S. at 652-653. Thus, in *United States v. Lynah,* 188 U.S. 445 (1903), the "authorized" governmental act was the construction of a dam, not appropriation of the plaintiffs' land. And in *United States v. Causby,* 328 U.S. 256 (1946), the "authorized" act was the flight of aircraft through navigable airspace, not an appropriation of a flight easement. Yet both were deemed compensable takings because that was required by the Fifth Amendment. Or, as this Court put it in *Hurley v. Kincaid, supra,* 285 U.S. at 104:

> "For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's land, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law" (footnote omitted).

In sum, the illegality of governmental conduct at bench, as in *Hurley,* did not consist of any absence of authority to act[18], but rather of acting in pursuance of such authority in an excessive way that deprived Respondent of any economically viable use of its land for the duration of the illegal conduct.

A second aspect of *Ruckelshaus* (and kindred cases) that warrants mention, is the Court's familiar inquiry into the availability of the Tucker Act remedy, which finds no application in cases such as this, where the taking arises by conduct of state rather than federal entities. All the Tucker Act does is waive the United States' defense of sovereign immunity, and designates a special court for monetary claims in excess of $10,000. The

[18]Quite the contrary. Petitioner vigorously asserts lawful possession of the police power to regulate subdivisions, which is not disputed. The controversy is over the way in which Petitioner wielded its plainly and concededly present authority. In other words, Petitioner's authority was not lacking; rather, it went "too far" (*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)).

Tucker Act in no way gives rise to a cause of action;[19] it is " . . . only a jurisdictional statute; it does not create any substantive right . . ." " . . . it merely confers jurisdiction upon [the Claims Court] whenever the substantive right exists . . .", *United States v. Mitchell,* 445 U.S. 535, 538-539 (1980). Accord, *United States v. Testam,* 424 U.S. 392, 398 (1976).

None of these concerns, however, have any applicability to lawsuits in federal courts against state and local defendants, for there jurisdiction is provided by 28 U.S.C. §1331 and 28 U.S.C. §1343, and the substantive right of recovery at law by the Constitution and 42 U.S.C. §1983. Indeed, it has long been settled that federal courts do have jurisdiction to entertain on the merits claims of takings by local entities. *Cuyahoga River Power Co. v. Akron,* 240 U.S. 462 (1916), *Mosher v. Phoenix,* 287 U.S. 29 (1932).

IV

PRESERVATION OF THE RIGHT TO JUST COMPENSATION FOR TEMPORARY TAKINGS AS PART OF A FLEXIBLE AND FAIR SYSTEM OF REMEDIES RESTS ON SOUND POLICY, SETTLED PRECEDENT, AND CONSERVATION OF JUDICIAL RESOURCES.

Any argument on the issue of remedies must at least begin with this Court's definitive analysis in *Hurley v. Kincaid, supra,* 285 U.S. 95, which is conceptually dispositive. When a taking is effected in pursuance of governmental powers — as is the case at bench — the property owner's grievance arises not

[19]Indeed, neither does it give rise per se to any particular remedy. What the Tucker Act does, is provide the jurisdictional and procedural means of pursuing a *constitutionally mandated* monetary remedy for a pre-existing substantive, constitutional "cause of action"; i.e., a completed taking of a property interest. *Jacobs v. United States, supra,* 290 U.S. at 16. Where such monetary remedy at law is adequate, this forecloses equitable relief (*Hurley,* 285 U.S. at 104; *Ruckelshaus,* 104 S. Ct. at 2880 [8]). For further discussion of the Court's analysis of the law of remedies, see *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949).

because of the taking,[20] but because compensation has not been paid (285 U.S. at 104). It follows, therefore, that if compensation is provided by the courts (whether at the government's or the owner's behest) the illegality is eliminated (Id.). Moreover, it is the courts that are have primacy in determining just compensation; see, e.g. *United States v. New River Collieries,* 262 U.S. 341, 343 (1923); *Seaboard Air Line Ry. v. United States,* 261 U.S. 299, 304 (1923).

Nor did *Hurley* stop there; it went on to admonish:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon a clear showing that its intervention is necessary to prevent an irreparable injury." 285 U.S. at 104, fn. 3.

That admonition, of course, puts its finger on the pertinent policy: it would be most improvident to structure a constitutional imperative striking down potentially vital regulations, *as the sole remedy,* merely because they impacted on a property owner so as to deprive him of a "stick" in his property rights "bundle". The *Regional Rail Reorganization Act Cases, supra,* provide an excellent example of the hazards inherent in Petitioner's theory. Had such a theory been applied there (as indeed it was by the trial court, only to be rejected by this Court) the upshot would have been an instant destruction by the stroke of a judicial pen of a comprehensive congressional scheme, that would have left the most densely populated regions of the country without an effective rail transportation system, with eight major railroads in the throes of fragmented, individual bankruptcy proceedings, without a coherent system whereby to

[20]This is so because the taking power is an inherent attribute of sovereignty (*Kohl v. United States,* 1 Otto (U.S.) 367 (1876)); the Constitution only limits it, inter alia, by requiring that just compensation be paid. *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

consolidate and make optimally useful all of their combined resources, still needed to maintain a national rail transportation system. The same is true of *Dames & Moore v. Regan, supra.* Had Petitioner's no-compensation approach been applied there, the result would have been a drastic disruption of the executive power to conduct foreign relations, with severe consequences to the affected citizens. Instead, the Court's opting for availability of the compensation remedy preserved both the governmental policies, and the rights of the few adversely affected individuals. While the instant controversy does not present the Court with such far-reaching prospects as the above cases, it still should not serve as a vehicle for the formulation of a dogmatic constitutional imperative that in future applications would compel judicial destruction of regulatory schemes that some day may be vital to national survival.[21]

As Mr. Chief Justice Marshall enduringly put it:

> "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. *This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.* This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v.*

[21]This is no hyperbole. Surely, it takes no vivid imagination to visualize governmental responses to the difficult problems of energy, deficit control, and inflation, for example, that may trench on constitutionally protected property rights of some individuals. Should that occur, which would be better public policy: to require the benefited public to pay only for those limited private rights destroyed in the process of thus bettering the public condition (see *San Diego Gas & Electric Co.,* 450 U.S. at 652), or to declare such programs completely invalid, with possibly calamitous consequences? (*Hurley,* 285 U.S. at 104, fn. 3).

Maryland, 4 Wheat. 316, 415 (1819), emphasis added.

Petitioner's thesis, that would have the courts invalidate legislative enactments on an ongoing basis, as the primary remedy, violates that principle, and ignores the gravity of judicial intervention in the workings of a tri-partite democratic government. When the judiciary invalidates a legislative enactment it is a measure of last — not first — resort. The judicial power to invalidate is historically rooted in "strict necessity" (*Rescue Army v. Municipal Court,* 331 U.S. 549, 568 (1947); *Spector Motor Service v. McLaughlin,* 323 U.S. 101, 105 (1944)), and is to be invoked only when "unavoidable" (*Alma Motor Co. v. Timken-Detroit Axle Co.,* 329 U.S. 129, 136 (1946)). See *Rescue Army v. Municipal Court, supra,* 331 U.S. at 571-572.

Petitioner's theory seems preoccupied with short-range provincial concerns of local governmental interests. It ignores the grave strain that judicial invalidation of legislation imposes on the fabric of a democratic society. It improvidently demands a rule that would have the judiciary tell the legislature what it may or may not enact, not in the historical context of major policy conflicts that have confronted the nation on occasion and thereby made legitimate claims on this Court's extraordinary power to invoke the organic law's grand scheme of checks and balances, but in terms of routine, day-in, day-out, case by case, ad hoc adjudications of purely local (usually intensely political) decisions involving what in national policy terms are but insignificant patches of land. Petitioner's approach would make the judiciary an ongoing supervisor of the local legislative branch; it would make this Court the Supreme Board of Zoning Appeals.

The foregoing is no hyperbole. Only a few state's law provides so-called site specific non-monetary relief;[22] i.e., judicial relief in the form of a decree that commands the regulating entity to allow a specified improvement on the

[22]See e.g. *Sinclair Pipeline Co. v. Village of Richton Park,* 167 N.E. 2d 406, 411 (1960, Ill.).

specific site. The vast majority of jurisdictions (in those cases where non-monetary relief is granted) merely remand the matter back to the regulatory entity for further action, thus inviting ongoing judicial involvement. Aside from the delay-laden inefficiency of such a procedure, it also opens up vast opportunities for either regulatory foot-dragging or outright bad faith, as acutely noted by Mr. Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego, supra,* 450 U.S. at 655, fn. 22.[23]

[23]It must be noted with great emphasis that the problem is far more pervasive than one might surmise from the entirely accurate, if somewhat flippant, remarks of a California city attorney quoted there. No less an expert than Richard F. Babcock, the dean of the land use bar, noted the severity of the problem in his book, "The Zoning Game" (Univ. Wisc. Press, 1966) at pp. 12-13, with devastating accuracy: "First, we have the multiplicity of jurisdictions, the innumerable decision-makers. In other significant areas of administrative law — the regulation of utilities, control over the issuance of securities, and the arbitration of disputes between employer and employee — there exist if not national at least statewide forums for the resolution of disputes. In the area of zoning there is no such centralized umpire to provide a sense of belonging to a common administrative practice, and, indeed, of sharing a common administrative ethic. Among these scattered groups of lay decision-makers there is an almost total lack of communication despite the efforts of innumerable planning groups, each offering earnest if generally diffused guidance. One of the most significant results of this fractured decision-making process is that *the injunctions of the judiciary have only nominal impact upon the decision-makers. If the Supreme Court of California makes a determination that the California Public Utilitites Commission has acted improperly, the impact of that judicial determination is direct and, in most instances, decisive. But if the Supreme Court of California were to say to the local legislature in Community X that its policy is improper that injunction, I suspect, would have little practical impact upon the identical administrative actions of Community Y or perhaps even on Community X itself.* Other lawyers have shared the experience that follows a victory on behalf of a landowner in the state Supreme Court. You have obtained a decision that the single-family classification of your client's property is unreasonable. Your client wants to use the property for commercial purposes. The community immediately rezones the property to a Duplex Zone and invites you to spend

Moreover, putting aside such potential for unwholesome governmental conduct, injunctive relief is often ineffective without judicial oversight. In practice, in order to have effective specific decree enforcement, one would have to embroil the courts even deeper in the ongoing administration of complex local land use schemes, and impinge further on the courts' limited resources. In contrast, in appropriate cases where a compensable economic loss has already been suffered, a court need only order recompense under the familiar rules of eminent domain valuation (*San Diego Gas & Electric Co.*, 450 U.S. at 658-659), thereby concluding the particular litigation, and freeing itself for other judicial business.

V

MR. JUSTICE BRENNAN'S VIEWS IN SAN DIEGO GAS & ELECTRIC CO. HAVE BEEN WIDELY ACCLAIMED, AND FORM A DESIRABLE BLUEPRINT FOR SOLUTION OF THE ISSUE BEFORE THE COURT

There is little that can be added to the above heading. The response of the Courts of Appeals speaks for itself. So far, the following Circuits have expressly opted to follow the views articulated in the Brennan opinion: [24] *Hernandez v. City of*

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another two years and thousands of dollars litigating *that* classification.

"This indifference to judicial decisions applies, by the way, even in jurisdictions such as Maryland, where, as in Baltimore County, there are relatively few independent municipalities and decisions with respect to land use are centralized in the county itself." Emphasis added.

Of course, since the time Mr. Babcock wrote, things have changed a bit, and a second round of litigation these days can easily consume a multiple of the "two years" he alludes to, to say nothing of tens of thousands of dollars, and likely more.

[24]Reasoning quite logically that since Mr. Justice Brennan spoke for four members of the Court, and Mr. Justice Rehnquist — although joining the majority on the jurisdictional point — was unmistakably clear in his endorsement of the substantive soundness of Mr. Justice

Lafayette, 643 F. 2d 1188 (1981, 5th Cir.), *Devines v. Maier*, 665 F. 2d 138, 142, (1981, 7th Cir.), *Barbian v. Panagis*, 694 F. 2d 476, 482, fn. 5 (1982, 7th Cir.), In *re Aircrash in Bali*, 684 F. 2d 1301, 1311, fn. 7 (1982, 9th Cir.), *Martino v. Santa Clara Valley Water Dist.*, 703 F. 2d 1141, 1148 (1983, 9th Cir.), *Fountain v. Metro Atlanta Rapid Transit Dist.*, 678 F. 2d 1038, 1043 (1982, 11th Cir.) and of course, the Court below: *Hamilton Bank v. Williamson County, etc., Comm'n.*, 729 F. 2d 402, 408 (1984, 6th Cir.). To the same effect, *Wheeler v. City of Pleasant Grove*, 664 F. 2d 99 (1981, 5th Cir.), endorsing the 42 U.S.C. §1983 damages remedy for temporary denial of use of the subject property under a local confiscatory land use ordinance. Also see, *Gordon v. City of Warren*, 579 F. 2d 386 (1978, 6th Cir.). Only the First Circuit adheres to the lonely and concededly problem-ridden position that non-monetary relief is the sole remedy: *Pamel Corp. v. Puerto Rico Highway Auth.*, 621 F. 2d 33 (1980, 1st Cir.)[25]

Similarly, in the short time since their articulation, the *San Diego Gas & Electric Co.* substantive views have commanded a following among state courts; see e.g., *Burrows v. City of Keene*, 432 A. 2d 15, (1981, N.H.); *Zinn v. State*, 334 N.W. 2d 67, 72-73 (1983, Wis.); *Rippley v. City of Lincoln*, 330

Brennan's views (450 U.S. at 633), the Brennan views clearly intimated the substantive and remedial views of the Court's majority, particularly since the majority opinion in *San Diego* merely addressed jurisdiction — it did not *dis*agree with the dissent's substantive views.

[25]It bears noting that *Pamel* was decided without benefit of *San Diego Gas & Electric Co.*, and the views expressed there are pure dictum, the holding being that the plaintiff failed to allege any causal connection between the defendant and the assertedly wrongful act (see 621 F. 2d at 36 [4]). In *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33-34, fn. 4 (1982, 1st Cir.), the First Circuit candidly expressed doubt about the soundness of its *Pamel* views in light of *San Diego*, but avoided its problem by resting the decision on Eleventh Amendment grounds, the defendant in *Citadel* being the Commonwealth of Puerto Rico.

N.W. 2d 505, 511 (1983, N.D.);[26] also see *Pioneer Land & Gravel v. Anchorage,* 627 P. 2d 651 (1981, Alaska) (Reserving judgment on proper remedy in light of *San Diego Gas &*

[26]In light of *Rippley's* agreement with Justice Brennan's opinion (". . . constitutes not only a legally correct analysis of the 'taking' involved but also provides a practical and fair solution for all parties," 330 N.W. 2d at 511 [5]) one is shocked to come across the amicus brief of California asserting (at p. 6, fn. 2) that North Dakota, among other states, denies the right to compensation (compare also *Kraft v. Malone,* 313 N.W. 2d 758 (1981, N.D.), and therein lies a bit of a tale. Space limitations prevent a full analysis of California's glob of sometimes dated string citations contained there. But it must be noted that several other states cited there have modified their positions and now allow inverse condemnation recovery in proper cases; they are Colorado (*Hermanson v. Board of Commissioners,* 595 P.2d 694 (1979 Colo. App.)), Oregon (*Seuss Builders v. Beaverton,* 656 P.2d 306 (1983, Ore.), and Florida (*Askew v. Gables-by-the-Sea,* 333 So. 2d 56 (1976, Fla. App.), *Key Haven Associates v. Board of Trustees, etc.,* 427 So. 2d 153 (1983, Fla.)).

In short, by its selective briefing, California is no friend of the court's taxed resources, and unfortunately the same is true of the collection of commentaries at p. 10, fn. 5, of its brief. The literature is indeed vast, but hardly as one-sidedly doctrinaire in its views as one might surmise by reviewing California's hand-picked examples. For a sampling of different views of commentators, see Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls,* 15 Rutgers L. Jour. 15 (1983), McMurry, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations,* 29 UCLA L. Rev. 711 (1982), Berger, *To Regulate or Not to Regulate — Is That the Question? Reflections of the Supposed Dilemma Between Environmental Protection and Private Property Rights,* 8 Loyola (L.A.) L. Rev. 253 (1975); Badler, *Municipal Zoning Liability in Damages — A New Cause of Action,* 5 Urban Law. 25 (1973). Note also that one of the polemical commentaries (by Prof. Girard) cited by California, was the subject of a devastating refutation by another commentator — see Berger, *The State's Police Power Is Not (Yet) the Power of a Police State: A Reply to Professor Girard,* 35 Land Use Law & Zoning Digest 4 (May 1983).

Electric, but in the meantime allowing the inverse condemnation action to proceed).

Apart from the above decisions expressly animated by the fairness and pragmation of the *San Diego Gas & Electric Co.* dissent, other states have independently decided to endorse the efficacy of the inverse condemnation "just compensation" remedy. Putting aside the invalidation-only jurisdictions fulsomely briefed by Petitioner and friends, these states may be grouped as follows:

(a) states which relegate the aggrieved land owner solely to monetary remedies: *Village of Willoughby Hills v. Corrigan,* 278 N.E. 2d 658 (Ohio 1972), cert. den. sub nom. *Chrongris v. Corrigan,* 409 U.S. 919 (1972), Douglas, J., dissenting (opinion); *Clifton v. Berry,* 259 S.E. 2d 35 (Ga. 1979); *Milardo v. Coastal Resources Mgt. Council,* 434 A. 2d 266 (1982, R.I.); *Hamilton v. Conservation Comm'n.,* 425 N.E. 2d 358 (1981, Mass. App.) (dictum).

(b) states which allow both specific relief *and* damages for demonstrable losses: *City of Austin v. Teague,* 570 S.W. 389 (1978, Tex.); *Ventures in Property I v. City of Wichita,* 594 P. 2d 671 (1979, Kan.); *Brazil v. City of Auburn,* 598 P. 2d 1 (1979, Wash. App.); Also see, *Sheer v. Township of Evesham,* 445 A. 2d 46 (1982, N.J. Super); *Key Haven Associates v. Board of Trustees, etc.,* 427 So. 2d 153 (1983, Fla.).

(c) states which express a preference for specific relief, but allow damages where such relief would be ineffective: e.g., *Hermanson v. Board of Commissioners,* 595 P.2d 694 (1979, Colo. App.), *Eck v. City of Bismarck,* 283 N.W. 2d 193 (1979 N.D.).

(d) New York is in a category by itself. It purports to hold that invalidation is the only remedy, unless there has been physical invasion or direct legal control of the affected property, or where the injury

suffered is irreversible, *Fred F. French Investing Co. v. City of New York,* 350 N.E. 2d 381 (1976 N.Y.). Yet, New York has steadfastly refused to compensate even for physical invasion (see, *New York Telephone Co. v. North Hempstead,* 363 N.E. 2d 694 (1977 N.Y.); *Loretto v. Teleprompter Manhattan CATV,* 423 N.E. 2d 320 (1982 N.Y.), reversed, 458 U.S. 419 (1982), or irreversible injury (see, *Charles v. Diamond,* 360 N.E. 2d 1295 (1977 N.Y.). At the same time, New York has routinely awarded damages for temporary de facto taking effected by use-stultifying regulation in *Keystone Associates v. State,* 371 N.Y.S. 2d 814 (Ct. Cl. 1975), rev'd. 389 N.Y.S. 2d 895 (App.Div. 1976), rev'd. and remanded, 383 N.E. 2d 560 (1978).

In sum, it appears that of the jurisdictions which have considered the issue of taking remedies *recently,* most opt for recognition of damages as a flexible and pragmatic component of a just and fair remedial scheme. Specific relief often remains available, but only as one component of a comprehensive remedial scheme, which is as it should be, for only a combination of these approaches can assure substantial justice to both sides in most cases.

This developing picture is in large measure due to the persuasive influence of Mr. Justice Brennan's views in *San Diego Gas & Electric Co.,* which are noteworthy because they posed no precedential compulsion. Yet, those views have been so often adopted because they are plainly right. Under that approach the rights of all parties are protected:

(a) The regulatory entity need not fear that its important policies will be frustrated against its will.

(b) The regulatory entity gets to opt for acquisition of an appropriate property right in the regulated land, or for retreat from its overly ambitious regulatory scheme.

(c) The landowner is assured of ability to proceed with *some* reasonable, economically viable use of his property, and is recompensed to the extent of demonstrable losses suffered.

(d) Even in the "worst case scenario" (from the regulatory entity's point of view), in those few cases where the entity's invasion of private rights is so egregious that it may be adjudged to acquire the stigmatized property (rather than merely pay for a limited/temporary interest therein), it gets in exchange for its money a valuable asset at its judicially determined fair value. The entity thereby loses little; it merely converts one asset into another. And if that should prove too burdensome, the entity has its relief in its own hands: it can then resell the thus acquired land and recoup its involuntary investment.[27]

In sum, the *San Diego Gas & Electric Co.* analysis is sound and fair, and has been remarkably persuasive to courts around the country in spite of its lack of precedentially compulsive effect. It is time to adopt it as the Court's holding.

CONCLUSION

"After all, if a policeman must know the Constitution, then why not a planner?"

Brennan, J.,
450 U.S. 661, fn. 26

In the final analysis, that question cuts to the heart of the matter. After all the polemics are done with, there remain but

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[27]The experience of the City of Palo Alto is instructive. In *Arastra Limited Partnership v. City of Palo Alto,* 401 F. Supp. 962 (1975 N.D. Cal.) the City was held liable, whereupon it settled (see 417 F. Supp. 1125) by acquiring the land in question for some seven million dollars. Later, land values rose sharply, and the tract in question is now reputed to be worth over twenty million dollars; the city is said to have explored selling the land to a developer at a huge profit.

few unyielding legal and factual realities at bench. *First,* the Constitution addresses takings, not merely *some* takings; it commands payment of "just compensation" — not inadequate compensation, and *a fortiori* not no compensation. *Second,* this court's settled precedential record is plain in its recognition of availability of just compensation as the remedy in uncompensated taking cases, because it is effective, pragmatic, and in the long run better serves the greater public interest, irrespective of the mechanics of the taking. *Third,* the *only* reason why this newly-resurrected remedies issue is being thrust on the Court at this late date, is the simple fact that planners and land use regulators demand for themselves a special privilege: a rule that would impose on them a lesser remedial responsibility to their victims than is faced by other constitutionally transgressing entities and officials. (See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls, supra,* 15 Rutgers L. Jour. at 99). No respectable reason has been advanced for such an unblushing demand that the Court create some sort of aristocracy, as it were, privileged to live above prevailing norms of constitutional accountability. Justice Brennan's policeman, reacting instantly to deadly peril, all alone in a dark alley, often with limited education and experience, still must know *and obey* the Constitution — and be accountable for his refusal to do so. No respectable reason appears why the municipal land use establishment, replete with planners, legal counsel and expert consultants, fully advised of its responsibilities, and acting at leisure (usually, as at bench, taking years to accomplish its purpose) should claim for itself a lesser standard of constitutional accountability.

As the court noted in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), in a changing world, the scope of constitutional guarantees must "expand and contract to meet the new and different conditions which are constantly coming within the field of operations." In the past half-century, their scope has contracted in the face of expanding (nay, exploding) land use regulations. But now the time is at hand to note that the sword and scales of justice have two sides. In the face of expansive

growth of land regulatory powers, it is time to reaffirm the line beyond which constitutional rights may not be impaired with impunity. "In a changing world, it is impossible that it should be otherwise" *(Euclid, supra). A fortiori* so, in a principled if changing world.

Land use regulations have at long last reached such a level of intensity and complexity that they often become counter-productive. Instead of regulating housing, they frustrate it; instead of solving problems, they exacerbate them. That is not in the public interest. It does not deserve the issuance of what amounts to a carte blanche. If permitted to go on unchecked and unrestrained by an obligation to make whole its victims, it is a process that is certain in the long run to erode property rights and impair other liberties; see *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at 415.

For ultimately, there can be no real liberty for people whose property rights can be snuffed out by an irresponsible government; liberty and property are in the final analysis interdependent and "neither could have meaning without the other" (*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)).

Amicus respectfully urges that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

GIDEON KANNER
Attorney for Amicus Curiae
California Building Industries Assoc.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 12, 1984, I served the within *Brief of Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

U.S. Supreme Court
One First Street N.W.
Washington D.C. 20543
(Orginal and 40 copies)

G.T. Nebel, Esq.
Bass, Berry & Sims
2700 First American Center
Nashville, Tennessee 37238
Counsel for Respondent

Robert L. Estes, Esq.
M. Milton Sweeney, Esq.
Stewart, Estes & Dornell
Third National Bank Building
Nashville, Tennessee 37219
Counsel for Petitioners

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 12, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)